TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 803

STEUART PURCELL, EDMUND H. BUDNITZ AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

FILED DECEMBER 15, 1941.

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IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Docket No. 1378

STEUART PURCELL, EDMUND H. BUDNITZ and ARTHUR H. BRICE, Constituting the Public Service Commission of Maryland, and McCullough Coal Corporation, a Maryland corporation, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY and The Baltimore and Ohio Railroad Company, Defendants

BILL OF COMPLAINT—Filed September 15, 1941

To the Honorable, The Judges of the District Court of the United States for the District of Maryland:

First: That the Plaintiff, the Public Service Commission of Maryland, is a commission or board appointed by the Governor of the State of Maryland, pursuant to appropriate legislative authority, for the purposes of, inter alia, regulating the rates and services of various corporations, including railroads and other common carriers, engaged in the rendition of public service within the State of Maryland and the said Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice are now and have been at all times since September 2, 1941, the persons comprising the said Public Service Commission of Maryland and that the statutory authority and duties of the said last mentioned Plaintiff are set forth in Sections 344 to 429 of Article 23 of Flack's Annotated Code of Public General Laws of Maryland, 1939 Edition.

That the Plaintiff, McCullough Coal Corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland and owns and operates, and for more than twenty years has owned and [fol. 3] operated coal mines, including properties, equip-

ment and appurtenances thereto, at or near the village of Friendsville in Garrett County, Maryland, and which said mines, equipment and appurtenances are adjacent to the line of the railroad now owned by The Confluence and Oakland Railroad Company, one of the Defendants herein and a wholly-owned subsidiary of The Baltimore and Ohio Railroad Company, and which said line is operated by said The Baltimore and Ohio Railroad, a Defendant herein, as lessee.

That the Plaintiffs were at all times parties to a proceeding before the Interstate Commerce Commission (hereinafter referred to as "the Commission") entitled "In The Matter of Application Of The Confluence And Oakland Railroad Company And The Baltimore And Ohio Railroad Company, Under Section 1 (18), Part I, Of The Interstate Commerce Act, As Amended, For A Certificate Of Public Convenience And Necessity To Abandon A Line Of Railroad And Operation Thereof", Finance Docket No. 12742, and the Plaintiffs were adversely affected by an order and certificate of the Commission entered on September 2, 1941 permitting and authorizing the Defendants, The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, to abandon the operation of a certain line of railroad extending from Confluence & Oakland Junction, Pennsylvania, to Kendall, Maryland, a distance of approximately 19.79 miles, and which said order is hereinafter more fully described and the enforcement of which is herein sought to be temporarily and permanently restrained.

Second: That the Defendant, United States of America, is made a party defendant in this matter, in conformity with the provisions of the Act of Congress approved March 3, 1911, as amended, 28 *U. S. C. A. par.* 46.

That the Defendant, The Confluence and Oakland Railroad Company, is a railroad corporation organized and existing under and by virtue of the laws of the State of Maryland and the Commonwealth of Pennsylvania, and, [fol. 4] as such, owns the above mentioned line of steam railroad located in Somerset and Fayette Counties, Pennsylvania, and Garrett County, Maryland, which it has been authorized and directed to abandon by the order and certificate of the Commission here involved. That said Defendant is made a party to this proceeding for the purpose

of securing an order or decree herein whereby it may be enjoined from abandoning said line of railroad.

That the Defendant, the Baltimore and Ohio Railroad Company, is a railroad corporation organized and existing under and by virtue of the laws of the State of Maryland and, as lessee of The Confluence and Oakland Railroad Company, operates the above described line of steam railroad, which operation it has been authorized and directed to abandon by the order and certificate of the Commission here involved. That the said Defendant is likewise made a party to this proceeding for the purpose of securing an order or decree herein whereby it may be enjoined from abandoning the said line of railroad or discontinuing the operation thereof.

That the said The Baltimore and Ohio Railroad Company and The Confluence and Oakland Railroad Company are hereinafter jointly referred to as "the Defendant Carriers".

Third: That the Plaintiffs herein institute this action against the United States of America under the Act of Congress approved October 22, 1913, as amended (28 *U. S. C. A.* 41 (28), 43-45, 45A-46, 47, 48) and pursuant thereto sues to enjoin, set aside, suspend and annul an order and certificate of the Commission in the aforementioned proceedings designated and known as Finance Docket No. 12742 and which said order and certificate purportedly permits and authorizes the Defendants, The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, to abandon the operation of the aforementioned line of railroad extending from Confluence & Oakland Junction, Pennsylvania, south to Kendall, Maryland, approximately 19.79 miles and which said line of railroad is located within the aforementioned Somerset and [fol. 5] Fayette Counties, Pennsylvania, and Garrett County, Maryland.

Fourth: That the Plaintiff, McCullough Coal Corporation (hereinafter referred to as "the Coal Company"), is the owner of bituminous coal lands and mining rights in and to lands comprising approximately 1,000 acres located in Garrett County, Maryland. The Coal Company owns, in addition thereto, loading facilities, trackage, railway cars, buildings, equipment and appurtenances, as well as an office building and residences for families of its employees, and all of which said facilities and properties are likewise

located in Garrett County, Maryland, at or near the Village of Friendsville. The properties of the Coal Company include four seams of bituminous coal, one of which is now being mined and three of which are available for opening although mining operations with respect to said last mentioned three seams have not yet actually been commenced. That substantially all of the Coal Company's production of coal is shipped by rail over the aforementioned line of railroad operated by the Defendant Carriers destined for various points of consignment located along the eastern seaboard. An industrial siding is owned and maintained by the Defendant Carriers and which provides facilities, immediately adjacent to the property of the Coal Company, for the loading of the coal produced by the Coal Company upon the cars of the Defendant Carriers and no other rail service or other feasible means of transporting such coal is available to the Coal Company. All shipments of coal by the Coal Company have, since the commencement of its operations, been made and are presently being made over the aforementioned line of railroad of the Defendant Carriers, the abandonment of which has been authorized and approved by the said order of the Commission dated September 2, 1941.

That during the period from 1921 to 1933 coal shipments were made by the Coal Company over the aforesaid line of railroad of the Defendant Carriers averaging 27,211 tons annually and during the period from 1934 to 1939 such shipments averaged 22,386 tons annually. During the calendar year 1940 such shipments made by the Coal Com-
[fol. 6] pany aggregated 26,355 tons and during the calendar year 1941, the shipments of coal of the Coal Company over the aforesaid line of railroad of the Defendant Carriers have been in the following monthly amounts:

1941	
January	3,213
February	3,998
March	6,020
April	5,698
May	5,110
June	5,169
July	3,680
Total	32,888

That the Coal Company's mine has been operated continuously for more than twenty years and extensive enlargements of its facilities have been made since its establishment and up to the present time.

That its properties, loading facilities, building and equipment have a value in excess of $300,000.00.

Fifth: That the village of Friendsville, Maryland, and the residents of the territory surrounding Friendsville, Maryland, and adjacent to the line of railroad, hereinafter more particularly referred to, are and have been for many years dependent upon the operation of the said line of railroad for adequate transportation service. A very large percentage of the residents of the village of Friendsville and the surrounding territory is dependent upon the operation of the coal mine of the Coal Company for its subsistence and the entire community would be irreparably damaged and injured, if not completely distorted, by a cessation of the operations of the coal mine and a loss of the service provided by the line of railroad.

Sixth: That the Defendant, The Confluence and Oakland Railroad Company, was formed in the year 1890 by a consolidation and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year the entire property was leased for 999 years to the Baltimore & Ohio, the owner of all the outstanding capital stock of The Confluence and Oakland Railroad Company. The line operates through a semi-mountainous section of Southwestern Pennsylvania and Western Mary-
[fol. 7] land and the service thereon consists of a mixed passenger and freight train in each direction on Tuesdays and Saturdays of each week, serving numerous rural communities and towns located in the states of Pennsylvania and Maryland with an estimated aggregate population of approximately 2,000 persons. The said line of railroad, as so operated, runs from a point at or near Rockwood, Pennsylvania, through the Confluence & Oakland Junction, Pennsylvania, to a point at or near Kendall, Maryland, connecting at Confluence & Oakland Junction with the main line of the Baltimore and Ohio Railroad.

The operation of the line of railroad of the Defendant Carriers, the abandonment of which has been authorized and approved by the aforementioned order and certificate of the Commission dated September 2, 1941, is and has for

many years been profitable to the Defendant Carriers and sufficient tonnage of unmined coal is owned by the Coal Company to assure substantial shipments over the said line of railroad in the approximate quantities presently being shipped for a period of at least eighty years from the date of the institution of these proceedings. The operation of the said line of railroad is, therefore, not a burden upon interstate commerce but is an advantageous and profitable operation to the Defendant Carriers, providing substantial movements of freight in interstate commerce and in furtherance of the public convenience and necessity.

Seventh: That the Defendant, United States of America, through its agency, the Secretary of War, acting pursuant to the Act of Congress of July 28, 1938 (33 U. S. C. A. par. 701-b-706), has commenced the construction of a certain flood-control dam across the Youghiogheny River located at a point on the aforesaid line of railroad about one mile from Confluence, Pennsylvania. That the reservoir created by the said dam, when at full elevation, will inundate approximately 15.24 miles of the aforesaid railroad line from the dam site to a point upstream near Friendsville, Maryland, leaving capable of operation only the section of railroad below the dam, in the absence of any relocation of the said line of railroad, will be to deprive the town of Friends-[fol. 8] ville and the Coal Company of railroad service of any kind whatsoever. That, pursuing his plan to construct a dam as aforesaid, the Secretary of War has acquired an option from the Defendant Carriers for the purchase of the affected part of the railroad line for the amount of $306,000.00, subject, however, to the approval by the Commission of the abandonment of the said line and railroad service by the said Defendant Carriers.

That the Defendant Carriers, at the behest of the Secretary of War, filed a joint application on or about January 15, 1940 for permission and authority to abandon the operation of the aforementioned line of railroad and hearings were thereafter held at Cumberland, Maryland, and Washington, D. C. before various examiners appointed and designated for that purpose by the said Commission. A report was filed by Examiner A. G. Nye on or about November 5, 1940 recommending that said application be denied and finding therein that the present and future public convenience and necessity did not permit of such abandonment. Ex-

ceptions to the aforementioned report were thereafter filed in behalf of the Secretary of War and the Defendant Carriers; and on March 6, 1941 Division 4 of the Commission entered or filed its report and order approving the aforementioned abandonment applied for by the Defendant Carriers and granting a certificate permitting the same, such certificate to be effective forty days after the issuance thereof.

A copy of the said report of Examiner Nye is filed herewith and made a part hereof and entitled "Plaintiffs' Exhibit No. 1", a copy of the said report and order of said Division 4 of the Interstate Commerce Commission is filed herewith and made a part hereof and entitled "Plaintiffs' Exhibit No. 2" and a copy of said certificate issued by Division 4 of the Interstate Commerce Commission on March 6, 1941 is filed herewith and made a part hereof and entitled "Plaintiffs' Exhibit No. 3".

That pursuant to the provisions of Sec. 17 of the Interstate Commerce Act, Part I (U. S. C. A., Title 49, Sec. 17, Subpar. 8-9), a petition for reconsideration was duly filed [fol. 9] by the Plaintiffs with the Commission and thereupon the Commission order- that the proceeding be opened for reargument and assigned the cause for hearing before the full Commission. On July 10, 1941 reargument of the entire proceeding was made before the Commission sitting as a whole and thereafter a report of the Commission on reargument and its order affirming the report and order of Division 4 were filed and entered. Said report of the Commission on reargument was dated as of July 31, 1941 but notice thereof was not received from the Commission by the Coal Company until August 14, 1941. A dissenting opinion was filed by Chairman Eastman, in which Commissioners Rogers and Patterson concurred. Commissioner Aitchison did not participate in the disposition of the case. A copy of the report of the Commission on reargument and of the said dissenting opinion is attached hereto and made a part hereof and entitled "Plaintiff's Exhibit No. 4".

That on September 2, 1941 the Commission entered its order affirming the aforementioned findings and conclusions of Division 4 of the Commission and providing in said order that the certificate issued by said Division 4 of the Commission on March 6, 1941 shall become effective from and after fifteen days from the date of said order of the Commission dated September 2, 1941. A copy of the said order

is attached hereto and made a part hereof and entitled "Plaintiff's Exhibit No. 5".

Eighth: That (i) the aforementioned report and certificate of Division 4 of the Commission dated March 6, 1941, (ii) the report of the Commission dated July 31, 1941 and (iii) the said order of the Commission dated September 2, 1941, are each unlawful, void and without legal force and effect and should be temporarily and permanently enjoined, set aside and annulled by this Court for the reasons that:

(1) The Commission was without jurisdiction or statutory authority to grant the relief prayed in the application of the Defendant Carriers for an abandonment of the line of railroad sought to be abandoned since such application on its face disclosed that the reasons or grounds therein [fol. 10] alleged in support of the same were unrelated to the public convenience and necessity.

(2) There was no substantial evidence before the Commission in the proceedings (Finance Docket No. 12742) to justify or support (i) the issuance of the report or certificate of Division 4 of the Commission dated March 6, 1941, (ii) the report of the Commission dated July 31, 1941 or (iii) the final order of the Commission entered in said proceedings on September 2, 1941.

(3) The application of the Defendant Carriers for an abandonment of the aforementioned line of railroad, as filed in the proceedings in question, and the granting thereof by the subsequent certificates and orders of the Commission were not based or grounded upon a consideration of the present or future public convenience and necessity as required by the Interstate Commerce Act but such application was filed by the Defendant Carriers and orders and certificates approving the same entered and issued by the Commission solely to facilitate construction of a flood-control project and in the absence of substantial evidence that the convenience and necessity of the transportation public or the promotion, protection or preservation of interstate commerce would be served.

(4) The record of the testimony and evidence in the proceedings before the Commission establishes as an uncontradicted fact that the line of railroad, the abandonment of which has been approved by the Commission, is now

and has for many years operated at a profit and is serving an essential public purpose in the furtherance of interstate commerce, the interest of the general transportation public and, in particular, the Plaintiff, McCullough Coal Corporation.

(5) The aforementioned orders and certificates issued by the Commission constitute arbitrary and capricious acts and a gross abuse of administrative discretion.

[fol. 11] (6) The aforementioned certificates and orders of the Commission constitute an unlawful exercise of its authority, are unsupported by substantial evidence and deprive the Plaintiff, McCullough Coal Corporation, of its property without due process of law and without just compensation therefor, and are in violation of the rights guaranteed to the Plaintiffs under the Constitution of the United States of America and the Fifth Amendment thereto.

(7) Unless the report and certificate of Division 4 of the Commission dated March 6, 1941, the report of the Commission dated July 31, 1941 and the order of the Commission dated September 2, 1941, are not set aside and annul-ed, and if a restraining order is not forthwith issued and the order of the Commission dated September 2, 1941 is not enjoined by this Court, the Defendants, The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, will proceed with the proposed abandonment of the line of railroad above-mentioned and the village of Friendsville, Maryland, the transportation public of the village of Friendsville, Maryland, the State of Maryland and the transportation public generally, as well as the Plaintiffs herein, will be deprived of railroad service and will suffer irreparable injury for which there is no adequate remedy at law.

Wherefore, in consideration of the premises and for as much as Plaintiffs are without remedy at law and their only protection must arise from the equitable jurisdiction of this Court, the Plaintiffs pray:

(a) That a writ of subpoena issue directed to the Defendants, commanding them and each of them to appear and answer fully to this Bill of Complaint, but not under oath, answer under oath being expressly waived.

(b) That this Court direct that due and proper notice [fol. 12] of this bill and proceeding issue and be served forthwith as prescribed in the said Act of Congress approved October 22, 1913 (28 *U. S. C. A. Secs.* 41 (28) & 43-48, *incl.*).

(c) That a court constituted as required by the said Act of Congress approved October 22, 1913 (28 *U. S. C. A.* 47) be immediately convened and that said court so constituted and convened grant a temporary stay or suspension in whole of the operation of the said order of the Interstate Commerce Commission dated September 2, 1941, as provided by the said section of said Act, upon three days' notice, restraining and suspending the operation and effect of said order or certificate for sixty days from the date of said order granting a temporary stay or suspension.

(d) That, upon five days' notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission and to the other Defendants herein, the Plaintiffs be granted a temporary injunction suspending and restraining the operation and effect in whole of said order or certificate issued by the Interstate Commerce Commission on September 2, 1941, until final decision upon this petition and application.

(e) That, upon final hearing, this Court constituted and convened as aforesaid enter a final decree herein perpetually and forever enjoining the operation and effect in whole of said order of the Interstate Commerce Commission dated September 2, 1941; said decree to adjudicate, hold, order and declare that the said (i) order or certificate of the Interstate Commerce Commission dated September 2, 1941, (ii) report or certificate of Division 4 of the Commission dated March 6, 1941 and (iii) report of the Commission dated July 31, 1941, are without warrant of law, are beyond the lawful authority of the said Commission, [fol. 13] are null and void and without legal effect and that they be set aside and forever annul-ed.

(f) That the temporary restraining order heretofore prayed be made to run against the Defendants, The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, requiring them to continue the operation of the said line of railroad from Confluence

& Oakland Junction, Pennsylvania, to Kendall, Maryland, throughout the pendency of this proceeding and until the final disposition of the Bill of Complaint by this Court.

(g) That Plaintiffs have and recover from the Defendants all proper costs of this suit.

(h) That Plaintiffs have such other and further relief as may be just and proper and equitable in the premises.

And Plaintiffs Will Ever Pray, Etc.

Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice, constituting the Public Service Commission of Maryland, by Steuart Purcell, Chairman. Joseph Sherbow, General Counsel to the Public Service Commission of Maryland, 1731 Munsey Building, Baltimore, Maryland. McCullough Coal Corporation, By Ford C. McCullough, President. Clarence W. Miles, Benjamin C. Howard, Attorneys for McCullough Coal Corporation, 1845 Baltimore Trust Building, Baltimore, Md.

[fols. 14-15] *Duly sworn to by Steuart Purcell and Ford C. McCullough. Jurats omitted in printing.*

[fol. 16] PLAINTIFFS' EXHIBIT No. 1

Interstate Commerce Commission

Finance Docket No. 12742

Confluence & Oakland Railroad Company Et Al.
Abandonment

Submitted— Decided—

Recommended that division 4 find that the present and future public convenience and necessity are not shown to permit abandonment by the Confluence & Oakland Railroad Company of its line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee.

W. D. Owens and *E. W. Young* for applicants.
Elliott W. Finkel for U. S. Department of Justice.

Lawrence A. Layton and *W. E. R. Covell* for U. S. War Department in favor of applicant.

J. W. Medford and *H. C. Kearby* for Order of Railroad Telegraphers.

Clarence W. Miles, Walter W. Dawson, Benjamin C. Howard, David S. Custer and *C. O. Ross* for protestants.

Report Proposed by A. E. Nye, Examiner

The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, lessee, jointly applied on January 15, 1940, for permission to the former to abandon, and to the latter to abandon operation of, the branch line of railroad extending from valuation station O minus 13 at Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, all in Somerset and Fayette Counties, Pa., and Garrett County, Md. The application is opposed by the Public Service Commission of Maryland. Protests were filed by local interests, and a hearing has been held.

The owning company was formed in 1890 by a consolida- [fol. 17] tion and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year, the line was leased for *99* years to the Baltimore & Ohio, the owner of all the outstanding capital stock.

The line operates through a semimountainous section following generally the Youghiogheny River as far as Kendall. There are numerous curves ranging from 6° to 17°, with prevailing grades of 0.8 percent northbound and 1.36 percent southbound. The track is laid with 60 and 67-pound rail, except for about 2.74 miles of 85-pound and larger. No deferred maintenance or need for unusual expenditures has been shown. As of December 31, 1936, the original cost to date of the property, exclusive of land and assessments for public improvements, was $398,875. As of the same date the cost of reproduction less depreciation, and the value of the land and rights therein, are reported by the Commission's Bureau of Valuation to have been $350,074 and $8,717, respectively. The applicants report the net salvage value of the recoverable property to be $25,965.

During the past five years train service has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rochwood, a point on the main line about 10 miles east of Confluence & Oakland Junction, where

the branch connects with the main line of the Baltimore & Ohio. The stations along the line, none of which is served by any other railroad, the population at each, and the approximate distance in miles from the Junction are [fol. 18] Charlestown, Pa., 50, 1; Flanigan, 10, 6; Tub Run, 20, 8; Somerfield, 250, 8; Reason Run, 10, 11; Watson, 26, 12; Geices, Md., 10, 13; Buffalo Run, 10, 14; Selbyport, 100, 15; Friendsville, 600, 17; Kendall, 10, 18. Somerfield and Friendsville are the only agency stations. The total population embraced within an area of 0.5 mile on either side of the line is estimated to be 2,000. Farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly along the line have closed down and been abandoned, except one, located between Friendsville and Kendall. This is the only industry of any importance.

U. S. Highway No. 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State Highways also parallel it at a substantial distance on each side. Township roads traverse the area and afford connections with these highways. No common-carrier bus or truck service is operating in the territory except at Friendsville, which is served by a truck line operating from Cumberland, Md. Deliveries are made to all points, however, by local and private trucks from Confluence and Somerfield.

The traffic handled over the line during the years 1934-39, in order, was as follows: Local passengers, 346, 239, 320, 566, 367, 430; interline passengers, 22, 8, 11, 4, 16, 8; carloads of freight handled between stations on the line and beyond (inbound), 502, 195, 222, 201, 196, 134; (outbound), 91, 285, 813, 525, 327, 735; less-than-carload (inbound), [fol. 19] 227, 326, 383, 381, 321, 249 tons; (outbound), 170, 21, 11, 27, 16, 32 tons. No local or bridge freight traffic was handled. During 1934 about 343 carloads of contractors' equipment, supplies and roadbuilding material were handled over the line. Since then the volume of such traffic, presumably used for maintenance purposes, has fluctuated from 49 carloads received in 1935, to 94 in 1938, and 36 in 1939. On the average, 51 carloads of farm products, animals, and fertilizer were received and less than 2 carloads shipped yearly. Inbound coal traffic averaged five cars a year, while outbound shipments were 23,

230, 531, 451, 311, and 725 carloads. Gasoline and oil shipments declined steadily from 98 carloads in 1934 to 30 in 1939, while shipments of forest products declined from 55 to 9 carloads.

The results of operation during the years 1935-39, in order, as shown by the applicants' income statements, were as follows: Revenues, local and assigned portions of interline, (passenger), $87, $52, $64, $70, $63, $67; (milk and miscellaneous), $114, $107, $101, $106, $93, $72; Freight (inbound), $5,221, $2,297, $2,717, $2,054, $2,634, $1,215; (outbound), $637, $2,252, $4,449, $3,690, $2,277, $5,729; system revenues from line traffic, including also minor amounts received by the Alton Railroad and the Staten Island Rapid Transit Railway, passenger, milk and miscellaneous, $380, $298, $279, $262, $390, $395; freight originating on line, $6,240, $20,589, $38,887, $30,561, $20,411, $54,065; destined to points on the line, $29,196, $14,201, [fol. 20] $15,887, $15,373, $14,768, $11,078; totals, $41,875, $39,796, $63,384, $52,116, $40,636, $72,621. Operating expenses, exclusive of overhead charges, were maintenance of way and structures, $6,045, $3,797, $6,226, $9,069, $5,767, $5,738; maintenance of equipment, $1,727, $1,946, $2,242, $2,135, $1,757, $1,965; transportation, $6,308, $6,876, $6,924, $7,067, $7,376, $7,444; taxes, $1,012, $998, $1,116, $1,729, $1,540, $1,627; totals, $15,092, $13,617, $16,508, $20,000, $16,440, $16,774; cost of handling line traffic over other parts of the system, $26,250, $26,084, $40,267, $35,132, $27,719, $48,799; operating losses, $9,033, $8,910, $9,176, $14,080, $11,372, $9,690; system profits from line traffic, $9,567, $9,004, $14,788, $11,054, $7,850, $16,738, which credited to the line would reduce the line losses shown above and show system profits of $533, $95, $5,609, $3,016 (deficit), $3,523, (deficit), and $7,048. Local freight, passenger, milk, and miscellaneous revenues are actually, while those earned in connection with the interline traffic were allocated to the line on a mileage prorate. Maintenance of way and structure expenses are actual, except where an apportionment was made because of overlapping maintenance sections; maintenance of equipment on system car and locomotive-mile basis; transportation expense includes the actual cost of operating stations and trainmen's wages, and a part of the equipment operating charges based on locomotive and car-miles in the different kinds of service. Tax accruals are mainly those assessed against the tangible property

[fol. 21] but also includes gross receipts, capital stock, franchise, and special taxes apportioned on a car-mile basis. Composite operating ratios, exclusive of taxes, based upon the volume of line traffic handled over the Baltimore & Ohio, the Alton Railroad, and the Staten Island Rapid Transit Railway, and ranging from a minimum of 73.14 percent to 77.93 percent, were used in estimating the cost of handling line traffic on other parts of the system.

Pursuant to the provisions of an Act of Congress of June 28, 1938 (52 Stat. 1215), the War Department has selected a point about 1 mile from the north end of the line for the site of a dam across the Youghiogheny River. This unit is one of six that are definitely scheduled for construction, under construction, or completed. Funds for the project have been appropriated by Congress, and allotted by the Secretary of War to carry on the work, which was to begin in April, 1940, and continue for about three years. When at full elevation the reservoir thus created will inundate approximately 15.24 miles of the line from the dam to a point upstream near Friendsville, leaving capable of operation only the section below the dam, which is to remain in service as long as it shall be required by the War Department for the delivery and removal of material and equipment used in the construction work. In the absence of any connection with the applicants' main line or any other railroad, the segment from the high-water mark [fol. 22] to the end of the line will be rendered inoperative. The plans provide for the relocation of all townsites, highways, and facilities subject to inundation. In accordance with the powers granted under the act, including the right to acquire land directly involved, by condemnation if necessary, which according to the evidence will be done if the application herein is not approved, the War Department has elected to exercise its option for the purchase of the affected part of the line for $306,000, subject to the approval of the proposal herein. This option agreement provides that the applicants shall remove all rails, ties, and movable property from the affected area within 90 days after the date of sale or forfeit their right thereto.

The applicants have submitted three estimates showing that the cost of relocating the line would be from $2,018,000 to $2,519,000. The War Department estimates the cost at $2,432,196. The applicants and the War Department insist there is no economic justification for relocating the

line at such expense, in view of the character and volume of traffic handled and the improbability of any improvement in the future.

The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous coal lands and coal rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail facilities. The record shows that practically its entire pro- [fol. 23] duction is marketed at nearby eastern points. In case the line is abandoned it would be necessary to use motor trucks between the mine and the nearest railhead at Grantsville, Md., at a cost of about $1.12 a ton. Under these conditions the coal company could not compete with other mines, and would be forced to close down. During the 1921-33 period, coal shipments averaged 27,211 tons annually and 22,386 tons during 1934-39. This latter average is about 722 tons a year more than reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. During the period 1933-35, shipments averaged about 8,086 tons annually, 29,728 in 1936-37, and 29,037 tons in 1938-39. The large increase in the 1939 tonnage is said by the applicants to result from the suspension of operations in the unionized bituminous coal fields during April and May of that year. This does not accord with the record, however. During 1938 and 1939, total production amounted to 18,972 and 40,102 tons, respectively, while the increased production during the time the strike was in progress amounted to only 8,581 tons over the corresponding period of the previous year.

The coal company contends that in view of the character and volume of traffic handled over the line, it was erroneous for the applicants to use a composite freight and passenger operating ratio to determine the cost of handling line traffic over other parts of the system, and contends that 25 percent [fol. 24] would be fair and reasonable. On this basis, system profits from line operations for 1934-1939 would average about $23,814 a year. At 50 per cent, profits would average $8,548 annually.

The applicants and the War Department contend that the construction of the dam in this instance, even if it is but one of a number of similar units designed to eliminate floods in the lower Monongahela and upper Ohio River

Valleys, creates a public interest greater than the interest of shippers who use the line, and as argued in brief, the application is not being submitted at this time because of deficits in operating the line or in anticipation of future losses, but solely upon the needs of the Federal Government. The authority of the Commission to permit abandonment on the grounds stated is questionable. In *Chicago, M. St. P. & P. R. Co. Trustees Abandonment,* 228 I. C. C. 467, 477, decided July 2, 1938, where it was argued that the abandonment of a branch line would retard, if not prohibit, the carrying-out of a constructive flood-control program, the division said:

> We are confined to the question of public convenience and necessity from a transportation standpoint along, and that would be affected by the flood-control program only to the extent that the applicants would be relieved of the expenses of repairing damage caused by flood waters.

In *Colorado & S. Ry. Co. Abandonment,* 221 I. C. C. 329, 341, decided April 30, 1937, where abandonment was urged to provide for the economical construction of a Federal roadbuilding project, the division said:

> [fol. 25] The bureau's (Public Roads) concern for a proper solution of this problem indicates commendable solicitude for the public interest, but the problem is related to the issue which we are herein called upon to determine, namely, public need for the railroad, only to the extent that the available means of transportation, after substitution of the highway for the railroad, would satisfy the transportation needs of the territory.

In *Motor Bus and Motor Truck Operation,* 140 I. C. C. 685, 737, the Commission said that certificates of public convenience and necessity are required for the purpose of protecting the public interest by excluding unnecessary and wasteful competition and by determining what persons or companies are best able to serve and meet the transportation needs of the public. This public interest to which the Commission must give predominant consideration has been defined by the Supreme Court in numerous cases. In *New York Central S. Corp.* v. *United States,* 287 U. S. 12, decided November 7, 1932, which involved a Commission

order under sections 5(2) and 20a of the Interstate Commerce Act, the court said:

* * * and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and best use of transportation facilities. * * *

In the latter case of *United States* v. *Lowden*, 308 U. S. 225, decided December 4, 1939, which arose under section 5(4) of the act, the court said that

[fol. 26] * * * "public interest" in this section does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system; that it is used in a more restricted sense defined by reference to the purposes of the Transportation Act of 1920, * * *.

The cases cited are sufficient to demonstrate that the public interest with which the Commission is concerned in this proceeding is limited to that of the necessities and convenience of the shipping and traveling public, and the effect upon such users of transportation, and interstate commerce generally, of the proposed abandonment. Division 4, therefore, should confine its consideration to the evidence relating to the transportation needs of the community served by the line and its value as an artery of interstate commerce. Inasmuch as Congress has directed the War Department how to acquire the land necessary to carry out the program, this Commission should not substitute its authority to accomplish by indirection what can be done directly and in accordance with the law under which the other agency of Government is functioning. The War Department argues on brief that the granting of the application herein will save the tax-paying public the high cost of relocating the line and cites *United States Feldspar Corporation* v. *United States*, 38 Federal 2nd, 91, decided February 12, 1930, where an industry affected by an abandonment authorized by the division in *Fonda, J. & G. R. Co. Abandonment*, 158 I. C. C. 379, decided December 10, [fol. 27] 1929, sought an injunction to prevent flooding the carrier's right-of-way and interrupting train service until the line could be relocated. The carrier had already

received a substantial award from the State, including relocation costs, pursuant to condemnation proceedings, when application for abandonment was filed with this Commission. In deciding the case the division restricted not only the scope of the evidence considered but confined its findings to the transportation features as related to the public convenience and necessity by saying:

> • • • While it is clear from the judgment entered by the court that one of the elements of damage included in the award was the cost of relocating the line, we are required primarily to decide from the evidence only whether the public convenience and necessity permit abandonment of operation between the stations named. (p. 380)
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> • • • • • • • •
>
> In the primary question of public necessity for this line, the financial and legal relations between the applicant and the State should not affect the finding. The evidence not only fails to establish the existence of sufficient need for rail service between Broadalbin Junction and Northville to warrant the continuation thereof, but it also shows that other means of transportation are used and may be extended to meet substantially all requirements. • • • (p. 387)

In the Feldspar case a 3-judge court approved the findings of the Commission, referred to the territory served by the line as having long been dying economically, and found that whatever transportation was necessary could be substantially furnished by motor trucks. The abandonment, therefore, was indirectly approved by the court not because the [fol. 28] land was required by the State for flood-control purposes as implied in brief, but only because there was insufficient traffic to support the line.

Several merchants of Friendsville whose use of the line averages about 40 carloads annually oppose the abandonment mainly because of the detrimental effect upon their business. It appears that much of the merchandise sold by them is delivered by motor trucks, the railroad being used mainly for cement, feed, and other heavy commodities. Representatives of the Borough of Friendsville also testified to the demoralizing effect the loss of the railroad would have on the economic life of the community. The Commis-

sion has repeatedly said that matters such as these are not of controlling importance.

The benefits accruing to the public from continued rail transportation service, the present and prospective needs of the public for such service commensurate with its ability to support a railroad, and the loss and inconvenience resulting from abandonment, must be weighed against the disabilities under which the applicants conduct their business. There is no evidence that the operation of the line has burdened the system in the past. The testimony shows that the present volume of traffic is expected to continue indefinitely. Under these circumstances there is no justification for authorizing abandonment of the line at this time.

It is recommended that division 4 find that the present and future public convenience and necessity are not shown [fol. 29] to permit abandonment by The Confluence and Oakland Railroad Company, and abandonment of operation by The Baltimore and Ohio Railroad Company, lessee, of the branch line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the application. An appropriate order should be entered.

[fol. 30] PLAINTIFFS' EXHIBIT No. 2

Interstate Commerce Commission

Finance Docket No. 12742

CONFLUENCE & OAKLAND RAILROAD COMPANY ET AL.
ABANDONMENT

Submitted January 16, 1941. Decided March 6, 1941

Certificate issued permitting abandonment by the Confluence & Oakland Railroad Company of a line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee.

W. D. Owens and *E. W. Young* for applicants.
Elliott W. Finkel for United States Department of Justice.
Lawrence A. Layton and *W. E. R. Covell* for United States War Department in favor of application.

J. W. Medford and *H. C. Kearby* for Order of Railroad Employees' organization.

Clarence W. Miles, Walter W. Dawson, Benjamin C. Howard, David S. Custer, and *C. O. Ross* for protestants.

Report of the Commission

Division 4, Commissioners Porter, Mahaffie, and Miller

By Division 4:

Exceptions to the report proposed by the examiner were filed, and the case has been orally argued.

The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, lessee, jointly applied on January 15, 1940, for permission to the former to abandon, and to the latter to abandon operation of, a line of railroad extending from valuation station 0 minus 13 at Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, all in Somerset and Fayette Counties, Pa., and Garrett County, Md. The application is opposed by the Public Service Commission of Maryland. Protests were filed by local interests, and a hearing has been held. All points mentioned herein are in Maryland unless otherwise stated.

The Confluence & Oakland was formed in 1890 by a consolidation and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year the entire property was leased for 999 years to the Baltimore & Ohio, the owner of all the outstanding capital stock.

The line operates through a semimountainous section of southwestern Pennsylvania and western Maryland, following generally the Youghiogheny River as far as Kendall. There are numerous curves ranging from 6° to 17°, with prevailing grades of 0.8 percent northbound and 1.36 percent southbound. The track is laid with 60-pound and 67-[fol. 31] pound rail, except for about 2.74 miles of 85-pound and larger. No deferred maintenance or need for extraordinary expenditures has been shown. The Confluence & Oakland owns no equipment. As of December 31, 1936, the original cost to date of the property, exclusive of land and assessments for public improvements, was $398,873. As of the same date the cost of reproduction less depreciation and the value of about 124 acres of land and rights in

private land were reported by our Bureau of Valuation to have been $350,074 and $8,717, respectively. The applicants report the net salvage value of the recoverable property to be $25,965.

During the past five years train service has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rockwood, a point on the main line about 10 miles east of Confluence & Oakland Junction, where the line connects with the main line of the Baltimore & Ohio. The stations along the line, none of which is served by any other railroad, the population at each, and the approximate distance in miles from the junction are: Charlestown, Pa., 50, 1; Flanigan, 10, 6; Tub Run, 20, 8; Somerfield, 250, 8; Reason Run, 10, 11; Watson, 25, 12; Geices, Md. 10, 13; Buffalo Run, 10, 14; Selbyport, 100, 15; Friendsville, 600, 17; Kendall, 10, 18. Somerfield and Friendsville are the only agency stations. The total population embraced within an area of 0.5 mile on both sides of the line is estimated to be 2,000. Farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly along the line have closed down and been abandoned except one, which is located between Friendsville and Kendall. This is the only industry of any importance.

U. S. Highway 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State highways also parallel it at a substantial distance on each side. Secondary roads traverse the area and afford connections with these highways. No common-carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating from Cumberland. Deliveries are made to all points, however, by local and private trucks operating mainly out of Confluence and Somerfield.

The traffic handled over the line during the years 1934-39, in order, was as follows: Local passengers, 346, 239, 320, 566, 367, 430; interline passengers, 22, 8, 11, 4, 16, 8; carloads of freight handled between stations on the line and off-line points, inbound, 502, 195, 222, 201, 196, 134; outbound, 91, 285, 613, 525, 327, 735; less-than-carload, inbound, 227, 326, 383, 381, 321, 249 tons; outbound, 170, 21, 11, 27, 16, 32 tons. No local or bridge freight traffic was handled. During 1934 about 343 carloads of contractors' equipment,

supplies, and road-building material were handled over the line. Since then the volume of such traffic, presumably used for maintenance purposes, has fluctuated from 49 carloads received in 1935 to 94 in 1938 and 36 in 1939. An average of 51 carloads of farm products, animals, and [fol. 32] fertilizer were received and less than 2 carloads shipped yearly. Inbound coal traffic averaged 5 cars a year, while outbound shipments each year, 1934-1939, in order, were 23, 230, 531, 451, 311, and 725 carloads. Incoming gasoline and oil shipments declined steadily from 98 carloads in 1934 to 30 in 1939, while shipments of forest products declined from 55 to 9 carloads.

The results of line operation during the years 1935-39, in order, as shown by the applicant's income statements, were as follows: Revenues, local and assigned portions of interline, passenger, $87, $52, $64, $70, $63, $67; milk and miscellaneous, $114, $107, $101, $106, $93, $72; freight, inbound, $5,221, $2,297, $2,717, $2,054, $2,634, $1,215; outbound, $637, $2,252, $4,449, $3,690, $2,277, $5,729; system revenues from line traffic, including also minor amounts received by the Alton Railroad and the Staten Island Rapid Transit Railway, passenger, milk, and miscellaneous, $380, $298, $279, $262, $390, $395; freight originating on line, $6,240, $20,589, $38,887, $30,561, $20,411, $54,065; destined to points on the line, $29,196, $14,201, $15,887, $15,373, $14,768, $11,078; totals, $41,875, $39,796, $62,384, $52,116, $40,636, $72,621. Operating expenses, exclusive of overhead charges, were maintenance of way and structures, $6,045, $3,797, $6,226, $9,069, $5,767, $5,738; maintenance of equipment, $1,727, $1,946, $2,242, $2,135, $1,757, $1,965; transportation, $6,308, $6,876, $6,924, $7,067, $7,376, $7,444; railway tax accruals, $1,012, $998, $1,116, $1,729, $1,540, $1,627, totals, $15,092, $13,617, $16,508, $20,000, $16,440, $16,774; cost of handling line traffic over other parts of the system, using composite operating ratios, exclusive of taxes, ranging from 73.14 percent to 77.93 percent, and based upon the volume of line traffic handled over the Baltimore & Ohio and subsidiaries, the Alton Railroad, and the Staten Island Rapid Transit Railway, but influenced mainly by the former, $26,250, $26,084, $40,267, $35,132, $27,719, $48,799; losses as an independent line operation, $9,033, $8,910, $9,176, $14,080, $11,372, $9,690; system profits from line traffic, $9,567, $9,004, $14,788, $11,064, $7,850, $16,738, which, offsetting the line deficits shown above, result in profits of

$533, $95, $5,612, $3,016 (loss) $3,523 (loss), and $7,048. Local freight, passenger, milk, and miscellaneous revenues are actual, while a portion of the interline revenue was allocated to the line of a mileage prorate. Expenses of maintenance of way and structure are actual, except where an apportionment was made because of overlapping maintenance sections. Maintenance of equipment was divided on System car-mile or locomotive-mile bases. Transportation expense includes the actual cost of operating stations on the line, and trainmen's wages and part of the equipment operating costs were divided according to locomotive-miles and car-miles operated in the different kinds of service. Tax accruals are mainly those assessed against tangible property, but also include gross-receipts, capital-stock, franchise, and special taxes apportioned on a car-mile basis. Assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50 percent of the revenues therefrom, the system profits from such traffic during each of the periods referred to would have [fol. 33] been $17,908, $17,544, $27,527, $23,098, $17,764, and $32,769, which, when offset by losses directly attributed to line operations, would result in net system profits of $8,875, $8,634, $18,351, $9,018, $6,412, and $23,079. Using a 25-percent operating factor claimed by the protestants to be more representative of the actual cost of handling line traffic over other parts of the system, the profit to the system for the same periods would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463.

Pursuant to the provisions of an act of Congress of June 28, 1938 (52 Stat. 1215), the War Department has selected a point on the line about 1 mile from Confluence, for the site of a dam across the Youghiogheny River. This unit is one of six that are scheduled for construction, are under construction, or have been completed. Funds for the project have been appropriated by Congress, and also allotted by the Secretary of War to carry on the work, which was to begin in April 1940 and continue for about 3 years. When at full elevation the reservoir thus created will inundate approximately 12 miles of the line from the dam site to a point upstream near Friendsville, leaving available for operation only the 1-mile section below the dam, which is to remain in service so long as it shall be required by the War Department for the delivery and removal of material and equipment used in the construction work. In the ab-

sence of any connection with the applicants' main line or any other railroad, the detached 6-mile segment from the high-water mark south to the end of the line will be rendered inoperative. Plans provide for the relocation of all townsites, highways, and other public facilities that will be inundated. In accordance with the powers granted under the act, including the right to acquire land directly involved by condemnation if necessary, which according to the evidence will be done if the application herein is not approved, the War Department has elected to exercise its option for the purchase of the affected part of the line for $306,000, subject to the approval of the application herein. This option agreement provides that the applicants shall remove all rails, ties, and moveable property from the affected area within 90 days after abandonment or forfeit their right thereto.

The applicants and the War Department have submitted four estimates showing that the cost of relocating the line would range from $2,018,000 to $2,519,000, or about $100,000 a mile. These estimates are in considerable detail and show specific routes and definite quantities and unit prices for the different kinds of construction involved. The principal protestant contends that these estimates are exorbitant because of the high unit prices used for land and material, and contemplate a type of construction not warranted by the amount of traffic handled or by the construction standards prevailing on the present line. An engineering witness for the protestant testified that a relocated line sufficient to carry the present traffic could be constructed for about $800,000 or possibly less. The applicants and the War Department assert that there is no economic justification for relocating the line at such a high cost to the taxpayers in the light of the present condition of business and the uncertainty of potential traffic, while the protestants con- [fol. 34] tend that, under the law, the War Department must relocate the line regardless of cost. We are not convinced of the accuracy of any of these estimates. It was also shown by the applicants that a new line built according to any of the estimates would require not only normal maintenance expenditures totaling about $8,000 annually in excess of the cost to maintain the present road, but would also necessitate an additional expense of about $8,000 a year over a period of 5 years while the line is undergoing

seasoning. The protestants' estimated maintenance expenditures for the line would be even higher.

The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous-coal lands and rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail connections. The record shows that practically the company's entire production is shipped by rail to nearby eastern points. In case the line is abandoned it would be necessary to use motortrucks between the mine and the nearest railhead at Grantsville, at a cost of about $1.12 a ton. Under such circumstances, the mine would be forced to close down because of inability to compete with other mines more favorably located. Trucks are used now for local deliveries only. Coal shipments averaged 27,211 tons annually during the 1921-33 period and 22,386 tons during 1934-39. This latter average is about 994 tons a year more than the outbound shipments reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. Shipments averaged about 9,086 tons annually during the period 1933-35, 27,728 tons in 1936-37. In 1938 the volume handled was 17,632 tons, and in 1939, 40,243 tons. The large increase in the 1939 tonnage is claimed by the applicants to result from a suspension of operations in the unionized bituminous-coal fields during April and May of that year.

The coal company contends that, in view of the kind of service furnished by the line and the volume of traffic handled, it was erroneous for the applicants to use a system composite operating ratio to determine the cost of handling line traffic over other parts of the system, and also contends that 25 per cent would be fair and reasonable. On the latter basis, system profits from line operations for the 1934-39 period would average about $23,781 yearly. Through the use of a 50-per cent factor, frequently used in cases of this character, profits would average about $12,395 annually. The returns filed by the applicants show an average annual profit of $1,125.

The coal company argues on brief that we cannot lawfully concern ourselves with the interests of those who in this instance will benefit by the construction of the flood-control project, but must confine our consideration to the interests of the transportation public, or promotion and

protection of interstate commerce. The authorities cited in support of that contention appear in the footnote below.[1] [fol. 35] The applicants and the War Department contend that the installation of the reservoir at the site selected, even if it is but one of a number of similar units designed to eliminate floods in the lower Monongahela and upper Ohio River Valleys, creates a public interest greater than the interest of shippers who use the line, and that the application was not submitted because of operating deficits or in anticipation of future losses, but solely to meet the needs of the Federal Government.

Among the numerous cases cited on brief by the War Department are *Transit Commission* v. *United States*, 284 U. S. 360, and *United States Feldspar Corporation* v. *United States*, 38 Fed. (2d) 91. We observe, however, that in most of these cases abandonment was authorized by us because revenues from the traffic handled over the railroad proposed to be abandoned were insufficient to meet ordinary operating expenses and the cost of improvements ordered by the public authorities.

Although the record herein does not contain any evidence showing the cost of repairing flood damage to those segments of the Baltimore & Ohio lying in the lower Monongahela and upper Ohio River Valleys, it is a matter of common knowledge that these catastrophies, which not only menace the safety of train operation but increase the cost of operations because of property destruction and suspension of train service, have occurred at varying intervals during the past, and in all probability will occur in the future until the flood-control project now under construction by the War Department is completed. It follows that the project when completed will, in many ways, not only benefit the general public but also the railroads that have been injured in the past.

The record shows that within 1 year the construction of the dam will have reached the point where appropriation

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[1] Sharfman "The Interstate Commerce Commission", Vol. II, page 264; *Colorado* v. *United States*, 271 U. S. 153; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12; *Texas* v. *United States*, 292 U. S. 522; *Schechter* v. *United States*, 295 U. S. 495; *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204; New England Divisions Case, 261 U. S. 184.

of the carrier land will be necessary. The railroad must then cease operations. Whether a substitute line should be provided, regardless of whether the cost of relocating is paid by the applicants or by the War Department, is doubtful in the light of the traffic handled during the past 6 years and what may be handled in the future. Even at the low operating cost urged by the coal company the net system profits annually since 1934 would not have been sufficient to produce a reasonable return upon an investment as low as $800,000. The inclusion of the estimated increase in maintenance costs would diminish the rate of return still more. We are of the opinion that the same consideration must be given to the proposed expenditure of public funds for relocating the line that would be given if the railroad were to bear the expense. If public funds are to be used to protect the coal company from loss caused as a result of the national flood-control program this should be done directly and not by means of uneconomic expenditures in railroad construction and maintenance.

Several merchants of Friendsville, whose use of the line averages about 40 carloads of freight annually, oppose the abandonment mainly because of the detrimental effect upon their business. It appears that much of the merchan- [fol. 36] dise handled by them is received and delivered by motortrucks, the railroad being used mainly for cement, feed, and other heavy commodities. Representatives of the Borough of Friendsville also testified to the demoralizing effect the loss of the railroad would have on the economic life of the community. We have heretofore held that matters of the kind last mentioned are not of controlling importance in cases of this character.

The benefits accruing to the public from continued rail transportation service, and the present and prospective needs of the public for such service commensurate with its ability to support a railroad, must be weighed against the loss and inconvenience which might be imposed upon interstate commerce. There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed. However, the further existence of this line of railway is not possible in view of the need of the land for flood control, and it must give way to a superior public use. If the railroad service now being performed is to be continued

the line must be relocated. Considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, we conclude that we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line.

We find that the present and future public convenience and necessity permit abandonment by The Confluence and Oakland Railroad Company, and abandonment of operation by The Baltimore and Ohio Railroad Company, lessee, of the branch line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the application. An appropriate certificate will be issued, effective from and after 40 days from its date, in which suitable provisions will be made for the cancelation of tariffs.

MILLER, *Commissioner*, concurring:

I am in entire accord with the purpose of the flood-control project, involved in this proceeding, because of the beneficial results which will accrue to the general public. However, I am not unmindful of the plight in which the abandonment of the railroad will place the coal company, which operates just beyond the area to be flooded and is dependent solely upon railroad service for its continued existence. It would seem, as indicated in the report, that under the circumstances here existing, equitable relief, to which I believe the coal company to be entitled, should be given directly because relocation of the tracks is not justified.

[fol. 37] CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 6th day of March, A. D. 1941

Finance Docket No. 12742

CONFLUENCE & OAKLAND RAILROAD COMPANY ET AL.
ABANDONMENT

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and

filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit abandonment by The Confluence and Oakland Railroad Company and abandonment of operation by The Baltimore and Ohio Railroad Company of the line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the report aforesaid.

It is ordered, That this certificate shall take effect and be in force from and after 40 days from its date. Tariffs applicable on said line of railroad may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That The Baltimore and Ohio Railroad Company, when filing schedules canceling tariffs applicable on said line of railroad, shall in such schedules refer to this certificate by title, date, and docket number.

And it is further ordered, That The Baltimore and Ohio Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 38] PLAINTIFFS EXHIBIT No. 3

Certificate of Public Convenience and Necessity

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 6th day of March, A. D. 1941

Finance Docket No. 12742

Confluence & Oakland Railroad Company et al. Abandonment

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions

thereon, which report is hereby referred to and made a part hereof:

It is hereby certified. That the present and future public convenience and necessity permit abandonment by The Confluence and Oakland Railroad Company and abandonment of operation by The Baltimore and Ohio Railroad Company of the line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the report aforesaid.

It is ordered. That this certificate shall take effect, and be in force from and after 40 days from its date. Tariffs applicable on said line of railroad may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered. That The Baltimore and Ohio Railroad Company, when filing schedules canceling tariffs applicable on said line of railroad, shall in such schedules refer to this certificate by title, date, and docket number.

And it is further ordered. That The Baltimore and Ohio Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission, division 4.

(Seal.) W. P. Bartel, Secretary.

[fol. 39] PLAINTIFFS' EXHIBIT No. 4

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 12742

Confluence & Oakland Railroad Company et al. Abandonment

Submitted July 10, 1941. Decided July 31, 1941.

Findings of division 4 that the present and future public convenience and necessity permit abandonment by the Confluence & Oakland Railroad Company of a line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee, affirmed. Previous report 244 I. C. C. 451.

John E. Evans for applicants.
Elliott W. Finkel for United States of America.
Clarence W. Miles for protestants.

Report of The Commission on Reargument

By The Commission:

By report and certificate in this proceeding dated March 6, 1941, 244 I. C. C. 451, division 4 permitted The Confluence and Oakland Railroad Company to abandon, and The Baltimore and Ohio Railroad Company, lessee, to abandon the operation of a line of railroad extending from Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, in Somerset and Fayette Counties, Pa., and Garrett County, Md. The case is now before us upon petition of the protestants, the McCullough Coal Corporation and the Public Service Commission of Maryland for reconsideration. Argument has been held pursuant to our order of June 2, 1941, reopening the case.

The following is a brief summary of the facts which are set forth in detail in the previous report.

[fol. 40] The line involved is located in the south central part of Pennsylvania and Western Maryland. Practically all the traffic handled is coal which moves from the mine of the McCullough Coal Corporation. Revenues from line operations have averaged about $51,571 annually since 1934, the largest revenue accruing during 1939, the latest year for which data are available. Actual and estimated operating expenses, the latter determined by the use of operating ratios ranging from 73 to about 78 percent, averaged $50,447, on which basis the average annual system profit was $1,125. Substituting 50 percent and 25 percent for these operating ratios, which the protestant alleges are more representative of the fair cost of handling line traffic over other parts of the system, the average annual profits from line operations would have been about $12,395 and $23,781, respectively.

The War Department is constructing a series of impounding dams throughout Pennsylvania to control water flowage in certain tributaries of the Ohio and Monongahela Rivers and thus to eliminate floods in the valleys of those streams. One of these structures is to be built in the valley of the Youghiogheny River, which structure, when com-

pleted, will create an artificial lake that will inundate about 12 miles of the line here under consideration. Although the petitioner's coal properties are situated above high-water mark, the interruption of line operations will deprive it of a rail outlet. The Flood Control Act, as amended, among other things, authorizes the Secretary of War to expend public funds to acquire title to all lands, easements, and rights-of-way; to relocate highways, railways, and utilities, and to reimburse those from whom property or rights therein are taken. No reimbursement is to be made [fol. 41] however for indirect or speculative damage. Instead of building a new line which, according to present day specifications is estimated by the applicant and the War Department to cost between $2,000,000 and $2,500,000, and requiring abnormal maintenance expenses amounting to $8,000 annually while the track structure is undergoing seasoning, the War Department holds an option to purchase that portion of the line actually required for reservior purposes for $306,000, the vendor to retain ownership in all property severable from the realty. The exercise of this option is conditioned upon obtaining our permission to abandon the line. The coal company estimates that the cost of duplicating the present line in another location would not exceed $800,000.

The War Department contends on brief and argument as sufficient reasons for the proposed abandonment, the high cost of relocation; the reasonableness of the proposed purchase price; the comparatively low value of the property of the coal company; the uncertainty of its economic value to the community; the slight extent to which it would be affected by discontinuance of the line; the uncertainty of the volume of business furnished to the line; and the superior use to be made of the railroad property by the Federal Government. The petitioners deny most of these contentions and the coal company states it will furnish sufficient coal tonnage in the future to permit of profitable operation of the line, and contends that the public convenience and necessity, which we are called upon to determine, require that if the proposed project is carried to completion, the line must be relocated.

In the previous report division 4 said:

[fol. 42] The benefits accruing to the public from continued rail transportation service, and the present and pro-

spective needs of the public for such service commensurate with its ability to support a railroad, must be weighed against the loss and inconvenience which might be imposed upon interstate commerce. There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed. However, the further existence of this line of railway is not possible in view of the need of the land for flood control, and it must give way to a superior public use. If the railroad service now being performed is to be continued the line must be relocated. Considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, we conclude that we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line.

The question presented to us is whether we should consider the broader interest of the general public in the proposed abandonment and the things that give rise to it, or confine ourselves, as contended by the petitioner, to a consideration of that interest which relates solely to the transportation public concerned with the facilities of the line of railroad involved herein and its relationship to interstate commerce generally.

On brief and at the argument counsel for the petitioner refers to decisions of the United States Supreme Court dealing not only with the general purposes of the Interstate Commerce Act but with our specific powers such as permitting abandonments in proper cases and establishing the criteria by which those powers must be exercised. It is not disputed that the flood-control program, of which the taking of the applicants' property is but a small part, will eventually benefit large numbers of persons, and including railroads, who, in the past, have suffered from the ravages of uncontrolled waters; that only a comparatively minor interest will be adversely affected by abandonment; that the [fol. 43] purchase price to be paid by the Government is reasonable; and that the future of the line concerning traffic and profits therefrom is uncertain. In view of these facts, we conclude that the petitioner's contention is untenable, and that we are not restricted in our deliberations to the considerations indicated by the petitioner. Congress delegated to us the authority to ascertain the facts

in these cases and to exercise thereon a judgment whether abandonment would be consistent with the public convenience and necessity. *Colorado* v. *United States* 271 U. S. 153. That we may consider the cost of future operations and improvements in arriving at such a determination is apparent from the decision of the same court in *Transit Commission* v. *U. S.* 284 U. S. 360. The War Department cites cases in support of the contention that because of present traffic conditions and the improbability of any increase in the future, the taxpayers should be spared the burden of paying for relocating the line and the railroad the expensive cost of future maintenance.

We are not unmindful of the plight in which the coal company will be, when service on the line is terminated, but similar cases in varying degrees are to be found in most contested abandonment cases. It is unfortunate that the law, as construed by the War Department will not permit compensation being paid for the loss of the coal company's business that is certain to follow unless the line is restored at another location. Our duty, however, lies not in determining the property rights of shippers who happen to be discommoded or forced out of business, but as stated in the previous report, to weigh the present and prospective need for the line and the benefits accuring to the public therefrom, against the burdens, present or prospective, that might be imposed upon interstate commerce.

[fol. 44] From a consideration of the entire record in this proceeding we find that the present and future public convenience and necessity permit abandonment of the line described herein. It follows therefore that the decision of division 4 must be, and it is hereby, affirmed.

EASTMAN, *Chairman*, dissenting:

We have here a line of railroad which, it is conceded, has been operated at a profit in the past, and there is nothing of record to indicate that it cannot continue to be operated at a profit, if allowed to remain where it now is. The question before us arises under section 1 (18) of the Interstate Commerce Act, and is whether the present or future public convenience and necessity permit the abandonment of this line of railroad. Except for one thing, there could be only one possible answer to this question, and that answer would

be "No". The single circumstance which, it is contended, justifies changing this answer to "Yes" is that the United States Government is about to build a dam which will inundate a large part of the line. It will not, however, inundate its principal source of traffic, which is a coal mine. If the line is abandoned, the mine will have no rail outlet and cannot continue to operate. It will not be under water, but that fact will afford no financial consolation. If we find that public convenience and necessity permit the abandonment, the Government has an agreement to buy that part of the line which will be inundated for $306,000, which is a figure based on the capitalized earnings of the entire line, both the part which will be and the part which will not be under water. The Government does not, however, propose to pay a cent to the owners of the coal mine, on the ground that it lacks statutory authority to compensate for "indirect or speculative damage".

[fol. 45] It is alleged, and no one disputes the fact, that the dam will be part of an extensive flood-control program which will result in much general public benefit, and that the lessee of the line, the Baltimore & Ohio Railroad Company, will share in this benefit. It is urged, therefore, that in determining whether public convenience and necessity permit the abandonment of the line, we should include in our consideration of the matter this general public benefit. There are, as I see it, two answers to this argument.

In the first place, it is clear that authority from us to abandon the line is not a prerequisite to the building of the dam. It will be built, whether or not we grant such authority. The only difference is that if we grant, it will not be necessary for the Government to exercise the power of eminent domain, whereas, if we do not grant, it will be necessary to invoke that power. In the latter event, the Government may be put to greater expense. From the standpoint of the Government and the broader public interest, therefore, all that is involved here is a matter of dollars and cents.

In the second place, our authority under section 1(18) is to determine whether lines of railroad should or should not be abandoned from the standpoint of the public interest as it relates to transportation. The power plainly was given us for the purpose of protecting the public against abandonments which cannot be justified from that stand-

point, and at the same time to lend specific governmental sanction to the abandonment of lines which are shown to be an undue burden upon interstate commerce. As was said in *Colorado* v. *United States*, 271 U. S. 153: "The sole objective of paragraphs 18-20 is the regulation of interstate commerce." And as was said in another connection in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12:

[fol. 46] The provisions now before us were among the additions made by the Transportation Act 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred.

Again, in referring to the powers of this Commission in *Schechter* v. *United States*, 296 U. S. 495, the Supreme Court said:

When the Commission is authorized to issue for the construction, extension *or abandonment of lines, a certificate of "public convenience and necessity"*, or to permit the acquisition by one carrier of the control of another, if that is found to be "in the public interest", we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and *can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation.* (Emphasis supplied.)

This Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement such as the flood-control program here involved. Other statutes which we do not administer provide for a determination of that question in an orderly manner and in accordance with the rules which relate to such determinations.

The United States Government has such a statutory remedy, so far as the building of this dam is concerned, and should proceed with it. In the present proceeding we have no evidence before us which warrants the conclusion that public convenience and necessity permit the abandonment of this line from the standpoint of the public interest in transportation which it is our duty, and our only duty, [fol. 47] to protect. If the Government should pursue its statutory remedy and take a large part of this line by right of eminent domain, it would then be our duty to determine whether the present or future public convenience and necessity require its reconstruction, at possibly great expense, upon a new location; but that question is not before us now.

It is quite possible that in that event another way of settling the matter with justice to all concerned would, or could, be found. As stated above, the railroad is willing to settle for $306,000. The other substantial interest involved is that of the coal mine which is the source of most of the present profitable traffic. The representatives of the Government have stated to us on brief and argument that this mine is of comparatively low value, and, as I understand it, its owners claim a value only slightly in excess of the amount which is to be paid for the railroad. This being the situation, it should be possible, by the aid of further legislation if necessary, to arrive at a reasonable settlement with the owners of the mine which will remove any demand for relocation of the line; and certainly justice demands that they be compensated for the loss which they will suffer upon the abandonment of a railroad which they have enabled, and are prepared to continue to enable, to operate at a profit.

For the reasons stated, I would deny the application.

I am authorized to state that Commissioners Rogers and Patterson join in this expression.

Commissioner Aitchison did not participate in the disposition of this case.

By the Commission.

W. P. Bartel, Secretary. (Seal)

[fol. 48] PLAINTIFFS' EXHIBIT No. 5

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 2nd day of September, A. D. 1941.

Finance Docket No. 12742

CONFLUENCE & OAKLAND RAILROAD COMPANY ET AL., ABANDONMENT

ORDER

Upon further consideration of the record in the above-entitled proceeding, of the report and certificate of Division 4 dated March 6, 1941, and the report of the Commission dated July 31, 1941:

It is ordered, That the findings of Division 4 that the present and future public convenience and necessity permit abandonment by the Confluence & Oakland Railroad Company of a line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee, be, and they are hereby, affirmed.

It is further ordered, That the certificate issued by Division 4 on March 6, 1941, shall become effective from and after 15 days from the date hereof.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 49] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION

Now comes the Interstate Commerce Commission, intervening defendant, and in answer to the bill of complaint filed in this case respectfully represents:

I

The averments of division "First" of the bill of complaint are admitted except that it is denied that the plaintiffs were

adversely affected or legally injured by the order and certificate of the Commission entered on September 2, 1941.

II

The averments of division "Second" of the bill of complaint are admitted.

[fol. 50]

III

The averments of division "Third" of the bill of complaint are admitted.

IV

The averments of division "Fourth" of the bill of complaint are denied except insofar as they accord with and appear in the reports of the Interstate Commerce Commission of March 6 and July 31, 1941.

V

The averments of division "Fifth" of the bill of complaint are denied except insofar as they accord with and appear in the reports of the Interstate Commerce Commission of March 6 and July 31, 1941.

VI

The averments of division "Sixth" of the bill of complaint are denied except insofar as they accord with and appear in the reports of the Interstate Commerce Commission of March 6 and July 31, 1941.

VII

The averments of division "Seventh" of the bill of complaint are admitted, but it is denied that the averment with respect to the filing of a proposed report by Examiner A. G. Nye on or about November 5, 1940, and the contents of said report, are material to any issue before this court.

VIII

The averments contained in division "Eighth" of the bill of complaint are denied.

IX

In further answer to the allegations of the bill of complaint, it is averred that said reports and orders of the

Commission in the proceeding before it, attached to and [fol. 51] made a part of the bill of complaint as Exhibits 1 to 5, inclusive, were not made or entered either arbitrarily or contrary to the relevant evidence or the law or without evidence to support them; that in making said reports and orders the Commission did not exceed the authority which had been duly conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint, and except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint insofar as they conflict either with the allegations herein or with the statements contained in said reports of March 6 and July 31, 1941.

All of which matters and things the Commission is ready to maintain and prove.

Wherefore the Commission prays that the complaint herein be dismissed.

Interstate Commerce Commission. By Daniel H. Kunkel, Attorney. Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 52] *Duly sworn to by Charles D. Mahaffie. Jurat omitted in printing.*

[fol. 53] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed September 29, 1941

The defendant, United States of America:

1. Admits the allegations of paragraphs 1, 2, 3, and 7 of the bill of complaint, except that it denies that the date of the Flood Control Act of 1938, pursuant to which the War Department acted in commencing the construction of the dam, was July 28, 1938, as alleged in paragraph 7, but alleges that it was in fact June 28, 1938.

2. Denies the allegations of paragraphs 4, 5, and 6, except insofar as the allegations contained therein appear in the reports of the Interstate Commerce Commission of March 6 and July 31, 1941, (Plaintiffs' exhibits Nos. 2 and 4).

3. Denies each and every allegation of paragraph 8, except that it admits the allegation of sub-paragraph 4 that [fol. 54] the line of railroad is now and has been operated at a profit and the allegation of sub-paragraph 7 that if the order of the Commission is not enjoined the railroads will proceed with the proposed abandonment.

Wherefore, it is prayed that plaintiffs' bill of complaint be dismissed.

Robert L. Pierce, Special Attorney, Department of Justice Counsel for the United States. Thurman Arnold, Assistant Attorney General. Frank Coleman, Special Assistant to the Attorney General. Bernard J. Flynn, United States Attorney.

[fol. 55] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ANSWER OF THE CONFLUENCE AND OAKLAND RAILROAD COMPANY AND THE BALTIMORE AND OHIO RAILROAD COMPANY—Filed September 29, 1941

The Defendants, the Confluence and Oakland Railroad Company and the Baltimore and Ohio Railroad Company, hereby join in the Answer of the United States of America to the complaint filed in the above stated proceeding, and adopt the admissions and averments, therein.

John E. Evans, Sr., Special Counsel for the Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, Defendants. Charles R. Webber, General Attorney of the Baltimore and Ohio Railroad Company and the Confluence and Oakland Railroad Company.

[fol. 56] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

No. 1378 Civil Action

STEUART PURCELL, EDMUND H. BUDNITZ and ARTHUR H. BRICE, Constituting the Public Service Commission of Maryland, and McCullough Coal Corporation, a Maryland Corporation, Plaintiffs,

versus

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY and The Baltimore and Ohio Railroad Company, Defendants

(Argued October 1, 1941)

Before Soper, Circuit Judge, and William C. Coleman and Way, District Judges

Joseph Sherbow for the Public Service Commission; Miles and O'Brien (by Clarence W. Miles and Benjamin C. Howard) for McCullough Coal Company; Bernard J. Flynn, United States Attorney, Robert L. Pierce and Elliott Finkel for the United States; Charles R. Webber and John E. Evans for the Baltimore and Ohio Railroad Company and the Confluence and Oakland Railroad Company; and D. H. Kunkel for the Interstate Commerce Commission.

OPINION—Filed October 13, 1941

SOPER, Circuit Judge:

This suit is instituted under the provisions of the Act of Congress of October 22, 1913, as amended, (28 U. S. C. A. 41 (28), 43-45, 45A-46, 47, 48), to enjoin the operation and effect of an order of the Interstate Commerce Commission dated September 2, 1941, whereby the abandonment of a line of railroad extending 19.79 miles from Confluence and Oakland Junction, Pennsylvania, to Kendall, Maryland, was authorized. The plaintiffs in the suit are the Public Service Commission of Maryland and the McCullough Coal Corporation, a Maryland corporation, which owns a coal mine in Maryland that will be adversely affected if the line of railroad is discontinued. The defendants are the United

States and the Confluence and Oakland Railroad Company, [fol. 57] a railroad corporation under the laws of Maryland and Pennsylvania, which owns the line of railroad in question, and the Baltimore and Ohio Railroad Company, a Maryland corporation, which operates the railroad as lessee. The Confluence and Oakland Railroad Company is a totally owned subsidiary of the Baltimore and Ohio Railroad Company.

Application was made by the carriers to the Interstate Commerce Commission, under Section 1 (18) of the Interstate Commerce Act, 49 U. S. C. A. 1 (18), for a certificate that the present and future public convenience and necessity permit the abandonment and removal of the line. The reasons given for the proposal were that the United States, acting through the War Department, proposes to construct a flood control dam on the Youghiogheny River about three miles above Confluence, Pennsylvania, which will require the abandonment of the railroad's entire line because it will be submerged for a distance of approximately 12 of its 19.79 miles, and the remainder of the line will become a detached segment without rail connection with any other railroad and will thus become valueless; and that the relocation of the line would require an expenditure that is not justified by the present and prospective revenues of the line, and would constitute an undue burden on interstate commerce without compensating advantage. The application also showed that the carriers had given an option to the United States for a period of 365 days to purchase the railroad for $306,000, (the Railroad Company reserving the right to salvage and remove the rail and other material), subject to the approval and authorization by the Commission of the abandonment of the line. Testimony was taken before an examiner and before Division 4 of the Commission, which found for the carriers in a report of March 6, 1941. Thereupon the McCullough Coal Corporation and the Public Service Commission of Maryland asked a reconsideration on the ground that there was no substantial evidence to support the issuance of the certificate of abandonment, and that the Interstate Commerce Commission was without jurisdiction to grant it. The matter was then heard by the Commission as a whole, and the decision of Division 4 was affirmed.

The facts as found by Division 4 of the Commission, and approved on reargument by the Commission as a whole,

may be summarized as follows: The railroad runs through a semi mountainous section following generally Youghiogheny River as far as Kendall. As of December 31, 1936 the original cost to date of the property, exclusive of land and of improvement assessments, was $398,873; and the cost [fol. 58] of reproduction less depreciation, and the value of the land, were estimated by the Bureau of Valuation of the Commission to be $350,074 and $8,717 respectively. The carriers estimated the net salvage value of the recoverable property to be $25,965.

During the last five years, train service has consisted of a mixed train in each direction on Tuesdays and Saturdays. The stations along the line are not served by any other railroad. The population, embraced within an area of one-half mile on both sides of the line, is estimated to be 2,000. Farming is carried on to a limited extent. One coal mine, located between Friendsville and Kendall, and operated by the McCullough Coal Corporation, is the only industry of any importance. United States Highway 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State highways also parallel it at a substantial distance on each side. Secondary roads traverse the area and afford connections with these highways. No common carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating from Cumberland. Deliveries are made to all points, however, by local and private trucks operating mainly out of Confluence and Somerfield.

The line has been operated at a profit. Setting out the figures with regard to the traffic handled and the revenues received during the years 1934-1939, Division 4 of the Commission found: "Assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50 per cent of the revenues therefrom, the system profits from such traffic during each of the periods referred to would have been $17,908, $17,544, $27,527, $23,098, $17,764, and $32,769, which, when offset by losses directly attributed to line operations, would result in net system profits of $8,875, $8,634, $18,351, $9,018, $6,412 and $23,079. Using a 25 per-cent operating factor claimed by the protestant to be more representative of the actual cost of handling line traffic over other parts of the system, the profit to the system for the same periods would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463." The report

of the Commission added that if operating ratios ranging from 73 to 78 per cent are used, the average annual profit was $1,125. The final conclusion of the Commission on this aspect of the case was that there was no evidence that the [fol. 59] line involved had theretofore been a burden on the system, or that the volume of traffic last reported would not continue if the line remained undisturbed.

With regard to the business of the McCullough Coal Corporation and the effect upon it of an abandonment of the railroad, the Commission made the following finding:

"The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous-coal lands and rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail connections. The record shows that practically the company's entire production is shipped by rail to nearby eastern points. In case the line is abandoned, it would be necessary to use motortrucks between the mine and the nearest railhead at Grantsville, at a cost of about $1.12 a ton. Under such circumstances, the mine would be forced to close down because of inability to compete with other mines more favorably located. Trucks are used now for local deliveries only. Coal shipments averaged 27,211 tons annually during the 1921-33 period and 22,386 tons during 1934-39. This latter average is about 994 tons a year more than the outbound shipments reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. Shipments averaged about 9,056 tons annually during the period 1933-35, 27,728 tons in 1936-37. In 1938 the volume handled was 17,632 tons, and in 1939, 40,243 tons. The large increase in the 1939 tonnage is claimed by the applicants to result from a suspension of operations in the unionized bituminous coal fields during April and May of that year."

The witnesses gave various estimates as to the value of the property and mine of the coal corporation, of which the largest was $308,262.13.

The War Department is proceeding with the flood control project under the Flood Control Act of June 28, 1938, 52 Stat. 12, 15. The Commission found that the plans of the Department provide for the relocation of all town sites, highways and other public facilities that will be inundated. Esti-

mates submitted by the carriers and the War Department for relocation of the railroad line ranged from $2,018,000 to $2,519,000, while the estimate of the Coal Corporation indicated that a relocated line sufficient to carry the present traffic could be constructed for $800,000. Estimates made by the contesting parties indicated an increased cost of maintenance if the new line should be built. With respect to the relocation of the line the Commission said:

"* * * Even at the low operating cost urged by the coal company the net system profits annually since 1934 would not have been sufficient to produce a reasonable return upon an investment as low as $800,000."

* * * * * * * *

"The benefits accruing to the public from continued rail transportation service, and the present and prospective needs of the public for such service commensurate with its ability to support a railroad, must be weighted against the loss and inconvenience which might be imposed upon inter- [fol. 60] state commerce. There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed. However, the further existence of this line of railway is not possible in view of the need of the land for flood control, and it must give way to a superior public use. If the railroad service now being performed is to be continued the line must be relocated. Considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, we conclude that we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line."

In its opinions the Commission also adverted to the public interest that will be served by erection of the dam. Thus Division 4 said that it was a matter of common knowledge that catastrophes resulting from the uncontrolled flow of the river are not only a menace to the safety of train operation, but increase the cost thereof, and therefore the flood control project when completed will not only benefit the general public but also the railroads; and the subsequent report of the whole Commission stated that the question

presented was whether consideration should be given to the broader interest of the general public in the proposed abandonment, or confined to that interest which relates solely to the transportation public concerned with the facilities of the line of railroad involved and its relationship to interstate commerce. On this point the Commission said:

"* * * It is not disputed that the flood-control program of which the taking of the applicants' property is but a small part, will eventually benefit large number of persons, and including railroads, who, in the past, have suffered from the ravages of uncontrolled waters; that only a comparatively minor interest will be adversely affected by abandonment; that the purchase price to be paid by the Government is reasonable; and that the future of the line concerning traffic and profits therefrom is uncertain. In view of these facts, we conclude that the petitioner's contention is untenable, and that we are not restricted in our deliberations to the considerations indicated by the petitioner. Congress delegated to us the authority to ascertain the facts in these cases and to exercise thereon a judgment whether abandonment would be consistent with the public convenience and necessity."

From this conclusion a dissenting opinion was filed which took the position that the authority of the Commission under Section 1 (18) of the statute is to determine whether lines of railroad should or should not be abandoned from the standpoint of the public interest as it relates to transportation; and that the Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement, such as the flood control project here involved.

[fol. 61] It is not necessary in this case to decide in which of the Commission's opinions the extent of its authority is more correctly defined. It is true that Congress has given the power to other agencies to decide whether a flood control project that will interfere with the operation of a railroad shall be built; and that in a number of decisions the Supreme Court has held that the criterion to be applied by the Commission in the exercise of its authority is not the

general public welfare, but "The adequacy of transportation service in its essential conditions of economy and efficiency, and to the appropriate provision and best use of transportation facilities." New York Central Securities Co. v. United States, 287 U. S. 12, 24; see also Colorado v. United States, 271 U. S. 153; Texas v. United States, 292 U. S. 522; United States v. Lowden, 308 U. S. 225. But we are primarily concerned with the question whether the action of the Commission in the instant case lay within its powers, and the controversy will be simplified if the discussion is limited to that question. We are justified in doing this because it is obvious from an examination of the reports of the Commission as a whole that it was satisfied, irrespective of the general benefits expected to flow from flood control, that the large expenditure required to relocate the railroad and the increased cost of maintenance in the future would impose an unreasonable burden upon the parent corporation, and that the public convenience and necessity, with respect to transportation, would be served by the abandonment of the line.

The plaintiffs make the contention in this respect that the Commission is without power to permit the abandonment of an established branch road which is serving the public acceptably at a profit to itself; and further, if such a branch road is destroyed by a superior power, that the Commission cannot authorize its abandonment but must sanction its relocation, even though the cost thereof is so high as to preclude a fair return from future operations, provided that the operation of the entire railroad system, main line and branches, will produce a fair return to the carrier.

This contention is based upon certain decisions which relate to actions of State Legislatures or State Commissions, and hold that a railroad carrier may be required by public authority to do a particular act or operate a particular part of its system, unprofitable in itself, if performance does [fol. 62] not involve the question of the profitableness of the operation of the railroad as an entirety. In such case, there is no deprivation of property without due process of law and the controlling authority has the power to consider the nature and extent of the carrier's business, its productiveness, the character of the service required, the public need for it and its effect upon the service already being rendered. If these criteria are reasonably applied, there

is no abuse of power. Atlantic Coast Line v. N. Car. Corp. Com'n., 206 U. S. 1; Ches. & Ohio Ry. v. Pub. Service Comm., 242 U. S. 603; Delaware, L. & W. R. Co. v. Van Santwood, N. D. New York, 216 F. 252, 232, F. 978.

It will be seen that these decisions do not lay down the absolute rule that the operation of a branch road at a loss must in all cases be continued if the system as a whole can be run at a profit; but the question is committed to the reasonable discretion of the controlling State authority. The power of the Interstate Commerce Commission within its field is no less. Section 1 (18) of the Act provides that no carrier shall abandon any portion of a line of railroad or the operation thereof unless there shall first have been obtained from the Commission a certificate that the present or future convenience or necessity permit of such abandonment; and Section 1 (20) provides that the Commission shall have power to issue such a certificate or to refuse it. The decisions already cited show that under these provisions it is left to the Commission to determine whether a proposed abandonment will further the interest of transportation by protecting interstate commerce from undue burdens, and in making this determination, for example, in such a case as ours, the Commission must consider the extent of the whole transportation and the dependence of the community affected upon the particular means of transportation which it is proposed to eliminate. The Commission's problem is to balance the respective interests and to decide whether the injury to the community affected outweights the burdens imposed upon the carrier; and the decision of the Commission is final if there is substantial evidence to support it. Int. Com. Comm. v. Louis. & Nash. R. R., 227 U. S. 88; Florida v. United States, 282 U. S. 194.

Section 1 (18), as we have seen, directs the Commission in making its determination in a case of abandonment to consider not only the present, but also the future public convenience and necessity; and in Transit Commission v. United States, 284 U. S. 360, it was accordingly held that in [fol. 63] deciding whether an unprofitable intrastate branch line should be abandoned, the Commission might properly take into consideration the magnitude of the outlay necessary to comply with a requirement of State authority that certain grade crossings on the branch line be abolished. In like manner the Commission in the instant case was not only authorized but required to take into account the un-

avoidable cessation of the carrier's branch line to make room for the project of flood control, and in so doing, to consider the high cost of relocation of the line and to decide whether, under all of the circumstances of potential traffic and expense, the public interest in respect to interstate transportation would be served by the continued operation of the road in a new location. The familiar problem of balancing conflicting interests was presented, which it was the province of the Commission to solve.

It was obviously in the interest of all concerned that the Commission make its decision in advance of the actual removal of the tracks and the flooding of the line, and this the Commission proceeded to do. It was said in the report of Division 4 of March 6, 1941 that the record showed that within one year the construction of the dam will have reached the point where appropriation of the carrier's land will be necessary, and the operation of the railroad must cease. The final order of the Commission of September 2, 1941 directed that the certificate of convenience and necessity become effective from and after 15 days. It was suggested during the argument before us that the order was premature in that it empowered the carriers to abandon the line before it was actually necessary, but this point was not urged by the protestants before the Commission, or mentioned in their bill of complaint in the pending case. There is no showing that the time for the occupancy of the lands is not now imminent. On the Contrary we were told during the argument that the tracks must be removed within a month if the work upon the flood project is to proceed according to plan. These circumstances do not justify a stay of operation of the Commission's order for the short intervening period.

The plaintiffs further contend that under section 4 of the Flood Control Act of 1938, 33 U. S. C. A. Section 701-c-1, the Secretary of War is authorized not only to acquire in the name of the United States title to the lands necessary for the dam with the funds appropriated for that purpose, but also to reimburse the owners for "highway, railway and utility relocation". We are told that the consent of the [fol. 64] Commission to the abandonment of the line upon the payment to the carrier of only the agreed value of its present line, unjustifiably relieves the United States of its obligation to pay for the relocation of the line and thereby damages the plaintiffs and other shippers in the area.

It is questionable whether the reference in the section to relocation was directed to all owners of the needed lands, or was confined only to the reimbursement of "states, political subdivisions thereof, and other responsible local agencies" for relocations which they might be required to make. However this may be, it is not and cannot be disputed that relocations of railroad lines may be made only with the consent of the Commission. It is the Commission's duty to make the decision, and it is immaterial whether the funds which the carriers propose to expend are to be taken from their general assets or are to be received from the United States in payment for the property. It would seem that the cost of reconstructing the line in a new location would not be a proper element entering into the value of the property taken by the United States, if permission to relocate cannot be obtained; and that an uneconomic outlay of funds would not be in the interests of transportation even though the money be derived from the national government.

We are not unmindful of the loss that will be inflicted upon the coal corporation by the abandonment of the line. It is suggested in the reports of the Commission that justice demands that the corporation be paid for the injury which it will suffer. But this is a matter beyond the scope of the present inquiry. While the Commission may consider the Coal Corporation's loss in making its determination, its decision will have no effect upon the right of the Coal Company to compensation, if any there be. Nor will the decision of this court prejudice the Coal Corporation in this respect.

An order will be signed dismissing the bill of complaint.

I concur. William C. Coleman, U. S. District Judge.

I concur. Luther B. Way, United States District Judge.

[fol. 65] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

No. 1378 Civil Action

STEUART PURCELL, EDMUND H. BUDNITZ and ARTHUR H. BRICE, constituting the Public Service Commission of Maryland, and McCullough Coal Corporation, a Maryland Corporation, Plaintiffs,

versus

THE UNITED STATES OF AMERICA, THE CONFLUENCE and OAKLAND RAILROAD COMPANY and The Baltimore and Ohio Railroad Company, Defendants.

ORDER DISMISSING BILL OF COMPLAINT—Filed October 13, 1941

It is ordered, adjudged and decreed this 13th day of October, 1941, by the District Court of the United States for the District of Maryland:

That the bill of complaint in the above entitled case be dismissed.

Morris A. Soper, United States Circuit Judge. William C. Coleman, United States District Judge. Luther B. Way, United States District Judge.

[fol. 66] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

PETITION FOR APPEAL AND STAY ORDER PENDING APPEAL—Filed November 5, 1941

To the Honorable Morris A. Soper, United States Circuit Judge, and the Honorable William C. Coleman and Luther B. Way, United States District Judges:

Conceiving themselves aggrieved by the order of the United States District Court for the District of Maryland made and entered in the above entitled cause on the 13th day of October, 1941, dismissing the bill of complaint filed

in said cause, the Plaintiffs therein appeal from said order to the Supreme Court of the United States and pray that such appeal may be allowed agreeably to the statutes and rules of the Court in such case made and provided;

And the Plaintiffs further pray that a stay of the Commission's order involved in this appeal may be granted pending determination of said appeal by the Supreme Court of the United States.

Dated: Oct. 31st, 1941.

Joseph Sherbow, General Counsel to the Public Service Commission of Maryland. Clarence W. Miles; Benjamin C. Howard, Attorneys for McCullough Coal Corporation.

[fol. 67] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ORDER ALLOWING APPEAL AND STAY PENDING APPEAL—Filed November 5, 1941

Upon the petition of Joseph Sherbow, counsel for Stuart Purcell, Edmund H. Budnitz and Arthur H. Brice, constituting the Public Service Commission of Maryland, and Clarence W. Miles and Benjamin C. Howard, attorneys for McCullough Coal Corporation, for an appeal from the final order of this Court entered on October 13, 1941, dismissing the bill of complaint filed in the above entitled cause, and praying that a stay of the Commission's order be granted pending the appeal, it is

Ordered, this 5th day of November, 1941, that the appeal prayed for in the aforegoing petition is hereby granted and allowed and, upon the Plaintiff's filing a bond in the principal sum of $1,000 with sufficient sureties and conditioned as required by law, it is further ordered, no objection thereto being interposed by the Defendants or any of them, that The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company be and they are hereby restrained and enjoined from abandoning the operation of the line of railroad running and extending from Confluence & Oakland Junction, Pennsylvania to Ken-
[fol. 68] dall, Maryland, pending a determination of the

said appeal by the Supreme Court of the United States; and it is further ordered that a citation issue returnable 40 days from the date hereof.

Dated November 5, 1941.

Morris A. Soper, United States Circuit Judge. William C. Coleman, United States District Judge. Luther B. Way, United States District Judge.

[fol. 69] Bond on Appeal for $1,000 approved and filed Nov. 5, 1941, omitted in printing.

[fol. 70] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 5, 1941

Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice, constituting the Public Service Commission of Maryland, by their General Counsel, Joseph Sherbow, and McCullough Coal Corporation by its attorneys, Clarence W. Miles and Benjamin C. Howard, file the following assignment of errors upon which the Plaintiffs rely in the prosecution of the appeal herewith petitioned for in the above entitled cause from the order of this Court entered on the 13th day of October, 1941, to wit:

(1) The Court erred in failing to find that there was no substantial evidence to support the order of the Interstate Commerce Commission granting the application of the Defendant Carriers to abandon the line of railroad running between Confluence & Oakland Junction, Pennsylvania, and Kendall, Maryland.

(2) The Court erred in failing to find that there was no substantial evidence that the public convenience and necessity would be served by the abandonment of the aforesaid line of railroad.

[fol. 71] (3) The Court erred in failing to hold that the Interstate Commerce Commission was without statutory authority to enter the aforesaid order upon the application and evidence before it.

(4) The Court erred in holding that the Commission had found that the interest of the transportation public would be served by the abandonment of the aforesaid line.

(5) The Court erred in holding that the Interstate Commerce Commission properly considered the question of relocation of the aforesaid line.

(6) The Court erred in failing to grant a temporary and permanent injunction restraining enforcement of the aforesaid order of the Interstate Commerce Commission.

Wherefore, the aforesaid Plaintiffs pray that the said order may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated: October 31, 1941.

Joseph Sherbow, General Counsel to the Public Service Commission of Maryland; Clarence W. Miles, Benjamin C. Howard, Attorneys for McCullough Coal Corporation.

[fols. 72-73] Citation in usual form showing service on appellees omitted in printing.

[fol. 74] IN UNITED STATES DISTRICT COURT

NOTICE TO ATTORNEY GENERAL OF MARYLAND

November 4, 1941.

Honorable William C. Walsh, Attorney General of Maryland, Baltimore Trust Building, Baltimore, Maryland.

DEAR SIR:

The United States District Court for the District of Maryland, sitting as a three-Judge Court pursuant to section 47 of 28 U. S. C. A., has granted an appeal to the Supreme Court of the United States to the Plaintiffs in the case of Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice, constituting the Public Service Commission of Maryland and McCullough Coal Corporation *vs.* the United States of America, the Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company.

Section 47a of 28 U. S. C. A. requires the Appellants in such a case to give notice to the Attorney General of the state. Pursuant to such statutory provision the Public Service Commission of Maryland and McCullough Coal Corporation, Appellants, hereby give you notice of said appeal. Attached hereto and made a part hereof are (i) the Petition for appeal and order allowing same, (ii) the Statement as to Jurisdiction, (iii) the Assignment of Errors, (iv) the Citation, and (v) Notice to Appellees as required by rule 12, paragraph 2 of the Supreme Court of the United States.

Very truly yours, Clarence W. Miles, Attorney for McCullough Coal Corporation.

Service of above notice admitted this 7th day of November, 1941.

William C. Walsh, Attorney General of Maryland.

WBR:k.

[fol. 75] In District Court of the United States for the District of Maryland

[Title omitted]

Stipulation as to Preparation and Certification of Transcript of Record—Filed November 17, 1941

To the Clerk of the United States District Court for the District of Maryland.

Sir:

It is hereby stipulated by and between counsel for the parties to the above entitled cause that the transcript of record, to be certified and transmitted to the Supreme Court of the United States pursuant to the appeal heretofore taken in this case, and in conformity with the applicable statutes and rules of the Court, shall include the following:

(1) Bill of Complaint.

(2) Plaintiff's exhibits 1 to 5, inclusive, to Bill of Complaint.

(3) Answer of United States of America.

(4) Answer of Interstate Commerce Commission.

(5) Answer of The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company.

(6) Opinion of the United States District Court for the District of Maryland.

(7) Petition of plaintiffs for appeal and stay pending appeal and order of court thereon.

(8) Assignment of Errors.

(9) Statement as to Jurisdiction.

(10) Citation.

(11) Proof of service under rule 12, paragraph 2 thereof and it is further stipulated by and between counsel for [fol. 76] the parties hereto that, conditioned upon obtaining the approval of this court, the following original papers are to be transmitted to the Supreme Court of the United States:

Plaintiffs' Exhibit A consisting of copies, certified by W. P. Bartel, Secretary of Interstate Commerce Commission of the following papers or document, viz:

(1) Application of Defendants Carriers filed January 15, 1940.

(2) Return to Questionnaire by Defendants Carriers filed on February 15, 1940.

(3) Corrected Return to Questionnaire filed by Defendants Carriers on March 30, 1940.

(4) Transcript of Stenographer's notes of hearing held April 11, 1940 at Cumberland, Maryland before Examiner Nye and Exhibits 1 to 12, inclusive, filed at said hearing.

(5) Transcript of Stenographer's notes of hearing held June 12, 1940 at Washington, D. C. before Examiner Molster and Exhibits 13 to 19 inclusive filed at said hearing.

(5½) Highway map (uncertified) pp. 296-297 Record.

(6) Petition of Plaintiffs for Rehearing filed April 10, 1941.

(7) Reply of United States of America filed April 18, 1941.

(8) Report and Certificate of the Interstate Commerce Commission filed and entered March 6, 1941.

(9) Order of Commission entered June 2, 1941 in finance docket No. 12742 The Confluence and Oakland Railroad Company, et al. abandonment.

Daniel H. Kunkel, For Interstate Commerce Commission; Robert L. Pierce, Counsel for the United States of America; John E. Evans, Sr., Charles R. Webber, Counsel for The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, Joseph Sherbow, Counsel for the Public Service Commission of Maryland; Clarence W. Miles, Benjamin C. Howard, Counsel for McCullough Coal Corporation.

Approved this 17th day of November, 1941. Morris A. Soper, United States Circuit Judge.

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE RECORD TO BE PRINTED—Filed December 18, 1941

Come now the appellants and say that they will rely upon the points made in their Assignment of Errors in brief and oral argument before this Court on their appeal in the above entitled cause.

Appellants further state that the entire record in this cause as filed in this Court is necessary for consideration of the points set forth above.

Joseph Sherbow, General Counsel for Public Service Commission of Maryland. Clarence W. Miles, Benjamin C. Howard, Counsel for McCullough Coal Corporation.

Filed the 17th day of December, 1941.

Service of a copy of this "Statement of Points to be Relied Upon and Designation of the Record to be Printed" acknowledged this 17th day of December, 1941.

E. M. Reidy (Dec. 17, 1941), Counsel for Interstate Commerce Commission. Robert L. Pierce (recd. Dec. 17, 1941), Counsel for United States of America. John E. Evans, Sr., Charles R. Webber, Counsel for The Baltimore and Ohio Railroad Company and The Confluence and Oakland Railroad Company.

[fol. 78a] [File endorsement omitted.]

[fol. 79] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 5, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Roberts took no part in the consideration and decision of this question.

[fol. 80] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 803

STIPULATION AS TO PORTIONS OF THE RECORD TO BE PRINTED—Filed January 28, 1942

It is hereby stipulated by and between the parties to this cause that plaintiffs' Exhibit A filed in this cause in the United States District Court for the District of Maryland, the same being the record of the proceedings before the Interstate Commerce Commission, duly certified to the Dis-

trict Court and included in the record before this Court, may be omitted in printing.

Clarence W. Miles, Benjamin C. Howard, Counsel for Appellant McCullough Coal Corporation. Joseph Sherbow, Counsel for Appellant The Public Service Commission of Maryland. James C. Wilson, Counsel for Appellee United States of America. John E. Evans, Sr., Charles R. Webber, Counsel for Appellees Confluence and Oakland Railroad Co. and the Baltimore and Ohio Railroad Company.

Endorsed on cover: File No. 46,131. Maryland D. C. U. S. Term No. 803. Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice, Constituting the Public Service Commission of Maryland, et al., Appellants, vs. The United States of America, The Confluence and Oakland Railroad Company, et al. Filed December 15, 1941. Term No. 803, O. T. 1941.